FROM BILATERALISM TO COMMUNITY INTEREST

Essays in Honour of Judge Bruno Simma

Edited by

Ulrich Fastenrath
Rudolf Geiger
Daniel-Erasmus Khan
Andreas Paulus
Sabine von Schorlemer
Christoph Vedder

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BALANCING INDIVIDUAL AND COMMUNITY INTERESTS: REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT

*Hans-Peter Kaul and Eleni Chaitidou**

I. Introduction

In his 1994 lecture at The Hague Academy, Judge (then Professor) Bruno Simma examined ongoing tentative efforts in international law to overcome the traditional structures of bilateralism and give way to the formulation and pursuit of community interests. While Bruno Simma understood bilateralism to be rooted in statal reciprocal legal relations protecting State sovereignty, he perceived the emerging concept of community interest as a 'consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States'.[1] Given the hesitation of States to react to breaches of such community interests on an inter-State level, he suggested that community interests be rather entrusted to independent institutions 'with no (or fewer) second thoughts standing in the way of true multilateralism'.[2] He pointed to the creation of the two ad hoc tribunals for the former Yugoslavia and Rwanda, hoping that the establishment of these institutions would encourage further attempts to equip community interests with adequate institutional outlays.[3]

This article is a small tribute to a great scholar and eminent practitioner who so attentively and sensitively commented ongoing trends in academic discourse and practice in international law. In his long and distinguished career, Bruno Simma has provided guidance and stimuli through his impressive and overwhelming oeuvre to students, academics, practitioners, and government officials alike. In

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* The views expressed herein are those of the authors and do not necessarily reflect the position of the International Criminal Court.

[1] B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours de l'Académie de Droit International 233.

[2] Ibid, 340.

[3] Ibid.

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view of his position as a Judge of the International Court of Justice (ICJ), we trust to offer some familiar thoughts on balancing at the International Criminal Court (ICC).

Essentially, the balancing exercise before the ICC involves two main interests: on the one side, there is the collective interest of States to try persons for 'the most serious crimes of concern to the international community as a whole' and to 'put an end to impunity'.[4] On the international plane, this 'communalized' interest of States has been entrusted to the ICC by dint of a multilateral treaty with a view to enforce those interests, in principle, independently and regardless of the will of States. As will be shown, other actors may join the Court in fulfilling its task. On the other side, there are particular interests advanced by various individuals or entities, including the interests of States rooted in a 'bilateralist' understanding of international relations, which either stand in opposition to the multilateralist commitment or which may conflict with each other. This modest contribution seeks to provide some reflections on how community and various individual interests have been incorporated in the Rome Statute (Sections II and III), which actors it involves (Section IV) and, illustrated with three selected topics, how those interests have been balanced in the Court's early jurisprudence (Section V). Finally, the contribution concludes with a tentative résumé of ongoing challenges and future perspectives of the Court (Section VI).

II. Community and Individual Interests in the Making of the Rome Statute

It may be argued that the developments in international law went beyond Bruno Simma's cautious appeal expressed in 1994. In the mid-1990s, approximately at the time of Bruno Simma's lecture in The Hague, several developments were underway: discussions in New York at the United Nations (UN) had gained momentum better to protect human rights through the prosecution of the most grave and heinous crimes by means of a permanent independent international criminal court.[5] The idea of an international criminal court had,

[4] Paras 4 and 5 of the Preamble and Art 5(1) of the Rome Statute, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute).

[5] The General Assembly had requested the International Law Commission (ILC) as early as 1978 to resume its work on the elaboration of a draft code of offences against the peace and security of mankind, UNGA Res 33/97 (16 December 1978) UN Doc A/RES/33/97; reaffirmed in UNGA Res 36/106 (10 December 1981) UN Doc A/RES/36/106. By Res 44/32 (4 December 1989) UN Doc A/RES/44/32 the General Assembly asked the ILC to continue its work on a draft code of crimes against the peace and security of mankind. On 28 November 1990, the General Assembly requested the ILC to consider the possibility of establishing an international criminal

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after the creation of the International Military Tribunal of Nuremberg[6] and the Far East,[7] already been envisioned in Article VI of the Genocide Convention[8] of 1948. The International Law Commission (ILC) had revitalized its project on the Code of Crimes Against the Peace and Security of Mankind[9] and the elaboration of a draft statute for an international court.[10] Previously, the international community had again been aroused by dramatic human catastrophes committed in the dismembering Yugoslavia and a little later in Rwanda. In the wake of these grave ruptures of international peace, articulating and pursuing community interests was entrusted to the UN at that time and, in particular, to its 'executive organ', the UN Security Council, responsible for the maintenance of international peace and security. The 15-member UN Security Council, based on resolutions under Chapter VII of the UN Charter, thus established the International Criminal Tribunal for the former Yugoslavia (ICTY)[11] and the International Criminal Tribunal for Rwanda (ICTR).[12] These institutions, in turn, also gave an important impetus to the ongoing law-making project within the UN for a future international criminal court.

court, UNGA Res 45/41 (28 November 1990) UN Doc A/RES/45/41, which was made a matter of priority in 1992, UNGA Res 47/33 (25 November 1992) UN Doc A/RES/47/33.

[6] The International Military Tribunal of Nuremberg had been established on the basis of an agreement signed by four States (and later acceded to by another 19 States): see Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (adopted and entered into force 8 August 1945) 82 UNTS 279.

[7] The International Military Tribunal for the Far East had been established by Special Proclamation of the Supreme Commander for the Allied Powers, General Douglas MacArthur, dated 19 January 1946.

[8] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[9] ILC, 'Draft Code of Crimes against the Peace and Security of Mankind', Report of the International Law Commission on the Work of its 48th session (6 May–26 July 1996) UN Doc A/51/10, 17 et seq (with commentaries).

[10] ILC, 'Draft Statute for an International Criminal Court', Report of the International Law Commission on the Work of its 46th session (2 May–22 July 1994) UN Doc A/49/10, 26 et seq (with commentaries). After receiving the ILC draft statute in 1994 the General Assembly established an Ad Hoc Committee tasked to review major substantive and administrative issues arising out of the ILC draft statute: UNGA Res 49/53 (9 December 1994) UN Doc A/RES/49/53.

[11] The accurate denomination of the tribunal is 'International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', UNSC Res 808 (22 February 1993) UN Doc S/RES/808. The updated statute of the ICTY may be found at <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> accessed 25 August 2010 (ICTY Statute).

[12] The accurate denomination of the tribunal is 'International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994', UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (ICTR Statute).

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All efforts, including the work of the Preparatory Committee over the years 1996–98,[13] culminated in convening a multilateral conference of plenipotentiaries in the premises of the Food and Agriculture Organization in Rome from 15 June to 17 July 1998[14] at which the Statute of the International Criminal Court was finally adopted.[15] Unlike the establishment of the international military tribunals of Nuremberg and the Far East and both ad hoc tribunals mentioned above, the creation of the ICC was a truly multilateral endeavour from the outset. Delegations from all (UN member) States, joined by a myriad of non-governmental organizations (NGOs), human rights activists, advisers, and observers had gathered in Rome to leave their imprint and agree on the terms of a statute underlying the new construct in international law. Political circumstances seemed opportune and civic demands pertinacious to create a new permanent court with universal orientation and prospective competence.

The law-making process was characterized by a balancing process of the various interests that were advanced. While it is not possible to recall all different positions and approaches in this article, suffice it to summarize in brief: the ambition was to establish an effective system for the prosecution of the gravest crimes and entrust a court to maintain and ensure those 'communalized' interests of States. But how was this court to be designed? At first, there was general consensus that the interests of UN member States had to be taken into full account. In other words, the 'bilateralism' permeating the infrastructure of international law formed the background to the negotiations with an emphasis on State sovereignty, consent, and the intangibility of the *domaine réservé*. Against the backdrop of bilateralist grounding, however, there was growing acknowledgment that the traditional answer to the occurrence of gravest crimes based on the *aut dedere aut judicare* principle had not proven to be adequate. The common goal was to establish a universal institution, acting beyond the special interests of States, which might potentially be competent for nationals of participating States. The individual would be held accountable for crimes in proceedings which would pay due regard to the rights of the suspect/accused and meet high standards of fairness and due process. In recognition of the multilateralist genesis of the Statute, it was clear that not one legal culture could or would prevail over another. Compromises were sought to establish a unique procedural framework which would embrace elements from different legal systems.[16] Furthermore, it was essentially France which added a further

[13] In 1995 the General Assembly established the Preparatory Committee mandated to elaborate a consolidated draft convention for an international criminal court taking into consideration the work of the ILC and that of the Ad Hoc Committee, including any comments from States: UNGA Res 50/46 (18 December 1995) UN Doc A/RES/50/46. The Preparatory Committee met six times during which it prepared the draft convention.

[14] UNGA Res 52/160 (15 December 1997) UN Doc A/RES/52/160.

[15] See n 4.

[16] On this question see, eg, C Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 J Intl Crim Justice 603; K Ambos,

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dimension of interests on the agenda, namely those of victims of such grave crimes. Before, during, and after the Rome Conference, France time and again submitted and insisted on proposals for victims' participation and possible reparations to victims. This concept was soon embraced by the negotiators and found general agreement. Yet, with all positions on the table, this was still a far cry from the adoption of the Rome Statute on 17 July 1998. In the long, intense, and difficult negotiations before the historic breakthrough, a decisive question was which legal approaches and mechanisms would enable the participating States to achieve the necessary agreement on the founding treaty of the future ICC. In the end, there was on the one side the group of like-minded States with court-friendly positions and approaches and a strong emphasis on community interests. On the other side, there were groups with an emphasis on traditional bilateralist positions protecting State sovereignty, such as the United States (US).[17] With its traditional penchant towards 'bilateralism',[18] the US was essentially advocating for a permanent ad hoc court depending on the UN Security Council. To arrive at the adoption of the Rome Statute, delegations were forced to break the impasse, in particular with regard to a set of unresolved key issues of a highly political nature: the relationship to national courts, jurisdiction, and cooperation. Another important point during the negotiations concerned delineating the contours of crimes 'of concern to the international community as a whole'. These were the main fields on which the battle between 'bilateralism' and community interest was fought. The Rome Statute illustrates that in the end community interests prevailed with, however, strong concessions to bilateralist demands.

III. Community and Individual Interests in the Rome Statute

1. Breaking the impasse: three key issues

On closer look, vital bilateral interests have found their way into the statutory framework. The solution for the crucial question of the relationship between international and national jurisdictions was found in the principle of

'International Criminal Procedure: "Adversarial", "Inquisitorial" or "Mixed"?' (2003) 3 Intl Crim L Rev 1; A Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC' in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) Vol II, 1485; GS Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45 Columbia J Transnational L 635.

[17] D Scheffer, 'The United States and the International Criminal Court' (1999) 93 American J Intl L 12; JR Bolton, 'The Risks and the Weaknesses of the International Criminal Court from America's Perspective' (2000) 41 Virginia J Intl L 186.

[18] It may be argued that the concept of 'American Exceptionalism' is a rather far-reaching, if not extraordinary, form of 'bilateralism' which continues to be a strong force in US attitude towards international law; see, for a critical analysis, HH Koh, 'On American Exceptionalism' (2003) 55 Stanford L Rev 1479.

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complementarity (Article 17 ICC Statute) which is the decisive basis for the entire ICC system:

> Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed.[19]

As is known, the admissibility criterion is encapsulated in the formula that ICC judicial proceedings are only admissible if the State, which would normally exercise jurisdiction, remains inactive or is unwilling or unable genuinely to carry out domestic proceedings in relation to crimes falling under the jurisdiction of the Court. The principle of complementarity illustrates the compromise reached to accommodate sovereignty concerns on the one side and the overarching goal to 'put an end to impunity' on the other. Consensus on this principle was the *conditio sine qua non* for convening the Rome Conference, the adoption of the Statute, and the subsequent establishment of the Court. The principle of complementarity was preferred over the principle of concurrent jurisdiction[20] adopted for both ad hoc tribunals, which gives primacy to the ad hoc tribunals over national jurisdictions. As the Rome Statute recognizes the primacy of national investigations and prosecutions, it thus reaffirms State sovereignty and, in particular, the sovereign and primary right of States to exercise criminal jurisdiction. This is further confirmed in the right of a State to challenge the admissibility of a case until the commencement of the trial, thus terminating ongoing proceedings before the Court.[21] However, a corollary of this mechanism—which already crystallized in the course of the first proceedings at the Court—is also the following: holding this primary right entails that States may take the sovereign decision to waive it unilaterally.[22] A State may aim to see the person brought to trial, but, for whatever reason, not before its national courts. The question of 'inability' or 'unwillingness' may therefore not be raised at all. Upholding 'communalized' interests in this case, the Appeals Chamber held: 'If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.'[23]

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[19] *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (Decision on the admissibility of the case under Article 19(1) of the Statute) ICC-02/04-01/05-377, Pre-Trial Chamber II (10 March 2009) para 34.

[20] Art 9 ICTY Statute and Art 8 ICTR Statute.

[21] Art 19(2)(b), (c), (4) and (5) ICC Statute.

[22] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)) ICC-01/04-01/07-1213-tENG, Trial Chamber II (16 June 2009).

[23] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497, Appeals Chamber (25 September 2009) para 85. The Appeals Chamber also added that, 'depending on the circumstances of each case, [the Court] may decide not to act upon a State's relinquishment of jurisdiction in favour of the Court'.

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While this does not per se 'taint' proceedings before the ICC, it nevertheless sheds some light on the relationship between the Court and the State, on the one side, and the position of the accused vis-à-vis the Court and the State, on the other.

The second key issue relates to jurisdiction. It is worth recalling that during the Rome Conference the 'exercise of jurisdiction' was the most important, politically the most difficult, and therefore the most controversial question, in short the 'question of questions of the entire project'. The proposals in Rome regarding the preconditions for the exercise of jurisdiction[24] were varying considerably, from subjecting the Court's operation to a restricted (cumulative) consent-based jurisdictional scheme[25] to the possibility for the Court to assume jurisdiction on the basis of universal jurisdiction.[26] The compromise finally agreed upon in Article 12(2) ICC Statute provides that for the Court to exercise jurisdiction in non-Security Council-triggered situations, either the State on the territory of which the conduct in question occurred (principle of territoriality; jurisdiction *ratione loci*), or the State of which the person accused of the crime is a national (principle of active nationality; jurisdiction *ratione personae*), must be a State party to the Statute. The same applies if a non-State party lodges an ad hoc declaration under Article 12(3) ICC Statute thereby 'accept[ing] the exercise of jurisdiction by the Court'. These jurisdictional links are not controversial in international law. The principle of territoriality is well entrenched in State sovereignty comprising the power of the State to exercise supreme authority over criminal conduct that takes place on its territory.[27] The principle of active nationality is equally accepted in most legal systems and is also laid down in several multilateral treaties.[28] At the same time these principles are the most restrictive bases for the exercise of criminal jurisdiction recognized by international law. This somewhat conservative jurisdictional regime is just another indication that the drafters of the Rome Statute had a pragmatic and realistic approach to bilateralist sensitivities.

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[24] For a detailed overview of the discussions, see HP Kaul, 'Preconditions to the Exercise of Jurisdiction' in Cassese, Gaeta and Jones, *The Rome Statute* (n 16) Vol I, 583; HP Kaul and C Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 Ybk Intl Humanitarian L 143; SA Williams and WA Schabas, 'Article 12' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* (2nd edn, Beck/Hart/Nomos, 2008) MN 5 et seq.

[25] See the US-American proposal submitted to the Committee of the Whole, UN Doc A/CONF.183/C.1/L.70 (14 July 1998).

[26] See the Informal Discussion Paper submitted by Germany, UN Doc A/AC.249/1998.DP.2 (23 March 1998).

[27] The inclusion of the principle of territoriality, potentially affecting nationals of non-States parties who may be brought before the ICC, proved to be the most contentious issue, notably because of the strong opposition of the US (see Section IV below).

[28] See, eg, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112, Art 5(1)(b); International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, Art 5(1)(b); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 229, Art 7(1)(c).

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The same holds true for the negotiations on the third key question, namely the regime of international cooperation and judicial assistance which complements the Court's procedural framework. The Court has not been given any power to execute its decisions and has no police force of its own. To compensate for this structural weakness to a certain extent, a rather detailed legal framework for cooperation has been introduced in Chapter IX of the Statute. In Rome, proponents of the 'horizontal approach', which puts an emphasis on State sovereignty by attributing weight to State interests, were confronted with adherents of the 'vertical approach', who were advocating for a stricter obligation to cooperate with the Court with fewer grounds to refuse cooperation.[29] In general, the Statute seems to express a preference for the vertical approach, thus strengthening and rendering effective the institutional support for pursuing community interests: States parties having consented to the Statute 'shall cooperate fully with the Court'[30] and 'shall ensure that there are procedures available under their national law for all forms of cooperation'[31] which are specified in the Statute. The Statute acknowledges the Court's 'distinct nature'[32] and thus seems to establish a special relationship between the Court and the cooperating State which differs from traditional reciprocal inter-State relations. This feature is further highlighted in the terminological distinction between 'surrender' to the Court and 'extradition' between States (Article 102 ICC Statute). Article 120 ICC Statute provides that no reservations be made, including to the statutory cooperation regime. However, on a number of occasions 'softeners' have permeated the *corpus juris*, such as references to national laws, consultation, and postponement clauses, thus accommodating and acknowledging individual State interests antithetical to that of the community.[33] What this carefully balanced compromise means for the daily work of the Court may be summarized in the following. The Court is wholly dependent on full, effective, and timely cooperation, in particular from the States parties. Consequently, cooperation and judicial assistance with States are a vital indispensable prerequisite for the functioning of the ICC. Since the establishment of the ICC, it has become obvious that this is especially true and decisive with regard to the crucial question of the effective execution of warrants of arrest and surrender of suspects to The Hague. As foreseen

[29] Kaul and Kress, 'Jurisdiction and Cooperation' (n 24).

[30] Art 86 ICC Statute.

[31] Art 88 ICC Statute.

[32] Art 91(2)(c) ICC Statute.

[33] The ICC Statute on several occasions refers to the law of the requested State (eg Arts 59(1), 89(1), 91(2)(c), 93(1), 96(2)(e), 99(1)). If the requested State identifies a problem in complying with the Court's request for cooperation, consultations may take place to reach flexible solutions (eg Arts 72(7)(a)(i), 89(2), 89(4), 91(2)(c) in conjunction with 91(4), 96(3), 97, 98, and 99(4)) or the execution of a particular request is postponed (eg Arts 94 and 95). Great importance has been attributed to the protection of national security information (Art 72). Further, the ICC Statute embraces the rule of speciality (Art 101) which is rooted traditionally in bilateral extradition laws. The ICC Statute also takes note of existing obligations of States in international law with respect to the State or diplomatic immunity of a person or property of a third State (Art 98(1)) and acknowledges obligations of a State under international agreements (Art 98(2)).

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and intended by the founders of the ICC, the Court is characterized by this structural weakness. It was the wish of the ICC's historic legislator that considerations of State sovereignty be taken duly into account.

2. Setting standards for the international community: the crimes falling under the jurisdiction of the Court

The Rome Statute set outs in Articles 6, 7, 8, and (future) 8bis the first comprehensive contemporary codification of international criminal law regarding genocide, crimes against humanity, war crimes, and the crime of aggression. For the purpose of the Statute, these provisions establish the criminalization and punishability of the prohibited conduct and provide the constitutive elements of its legal characterization. They serve at the same time as jurisdiction-endowing provisions, elevating ordinary crimes, which normally would fall under the exclusive jurisdiction of a State, to the level of *delicta juris gentium* thus setting aside considerations of State sovereignty. The crimes are further defined in the Elements of Crimes which shall assist the Court in the interpretation and application of Articles 6, 7, 8 (and 8bis) ICC Statute. The codification is the result of multilateral negotiations on the international plane as sketched above. With ever-increasing membership, the Statute may grow into an international criminal code for the entire world. In Bruno Simma's words, one witnesses that international law 'matur[es] into a much more socially conscious legal order'.[34]

The Statute also manifests another phenomenon of 'communalization': as a rule, the criminalization and punishment of crimes within the territory of a State belongs to the internal legal order of that State. If the crime reaches a certain transnational dimension, States may enter into inter-State agreements obliging the participating States to criminalize certain conduct and adopt implementing national legislation in an attempt to repress that conduct. In both scenarios, the individual remains subject to an act of State power. With the creation of international tribunals, however, the prohibition of a particular individual conduct was transformed into a genuine international rule addressing and holding the individual accountable directly under international law. Thus, through Article 6 ICC Statute, the existing obligation for States parties of the Genocide Convention to prevent genocide and punish perpetrators—until then primarily a matter of State responsibility—was turned into and consolidated in a genuine norm of international criminal law establishing individual criminal responsibility of perpetrators of the crime of genocide. Likewise, through Article 8 ICC Statute, the existing obligation for States parties of in particular the Geneva Conventions and the two Additional Protocols to prevent the violations of the prohibitions set out in these multilateral treaties and to punish the perpetrator—again until then primarily a matter of State responsibility—was turned into and consolidated in a genuine norm of international

[34] Simma, 'From Bilateralism to Community Interest' (n 1) 235.

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criminal law establishing individual criminal responsibility for war crimes. With regard to crimes against humanity, Article 7 ICC Statute is the first comprehensive and genuine norm of international criminal law, establishing individual criminal responsibility of perpetrators of this crime. All the crimes mentioned above are penalized and sanctioned appropriately by international law. Article 77(1) ICC Statute provides that a sentence of 30 years may be imposed. When justified by the extreme gravity of the crime, the sentence may be life imprisonment. Obviously this amounts to a considerable strengthening of the existing prohibition of these offences.

In order to reach concrete definitions of genuine norms of international criminal law, the delegations of States in Rome undertook a balancing process with a view to reconciling the community interest of putting an end to impunity with the interest of States to protect themselves against unwarranted interventionism. To this end, States agreed to include in the Statute a (limited) list of crimes—captured by the notion of 'core crimes'—which per se concern the international community as a whole and transcend the exclusive competence of a State.[35] A closer inspection of the statutory definitions of these crimes (together with the Elements of Crimes) reveals that they have been fitted with certain qualifiers or have been subjected to thresholds, again in an attempt to safeguard State interests and restrict the jurisdictional ambit of the Court. The following may illustrate this: with regard to the crime of genocide, the wording of the Statute enumerates a set of acts and, unlike, for example, with crimes against humanity, remains silent as to whether an act of genocide must be committed within the framework of genocidal policy. However, the States guide the Court in the Elements of Crimes suggesting that the conduct in question should have taken place 'in the context of a manifest pattern of similar conduct directed against [the targeted] group'.[36] Therefore the Court seems to be directed that isolated or sporadic events outside a widespread policy or plan would fall outside the jurisdictional reach of the Court. With regard to crimes against humanity, any of the enumerated acts in Article 7 ICC Statute must occur as 'part of a widespread or systematic attack directed against any civilian population'. This contextual element, in which the specific crimes of Article 7 have been embedded, needs to be met in order for the conduct in question to amount to an international crime. States therefore defined that conduct which is not embedded in this context

[35] This trend emerged at the early stages of the negotiating process: see UNGA 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR 50th Session Supp No 22 UN Doc A/50/22 (1995) para 54; UNGA 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March–April and August 1996)' UN GAOR 51st Session Supp No 22 UN Doc A/51/22 (1996) para 103.

[36] See the last paragraph common to all specific crimes in the Elements of Crimes related to Art 6 ICC Statute. This leaves the question unanswered whether the establishment of a 'contextual element' by the Elements of Crimes is compatible with the wording of the ICC Statute, which lacks such a requirement.

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is to remain outside the jurisdictional ambit of the Court. With regard to war crimes, the wording of Article 8(1) ICC Statute implies that the Court can only exercise jurisdiction over war crimes, 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. This threshold, albeit not a legal ingredient of the definition of war crimes, has been interpreted to be a 'practical guideline' for the Court, and its Prosecutor in particular, on what types of war crimes it should focus on.[37] With regard to conduct in the context of an armed conflict not of an international character, two further State-oriented safeguards have been woven into the fabric of the Statute: Article 8(2)(d) and (f) exempt scenarios of internal disturbances and tensions from the jurisdiction of the Court;[38] and Article 8(3) clarifies that in the context of a non-international armed conflict, any government may maintain or re-establish order in the State and defend the unity and territorial integrity of the State by all legitimate means.

With regard to the crime of aggression, the fourth of the most serious crimes of concern to the international community as a whole, one may pause for a moment and consider the significant, if not historic, breakthrough achieved by the Review Conference held in Kampala, Uganda in June 2010. After often painstaking, seemingly endless *travaux préparatoires*[39] over the last seven years in the Special Working Group on the Crime of Aggression,[40] a complex compromise and package proposal was adopted by consensus in the late evening of 11 June 2010, the last day of the Review Conference, attended by States parties, non-States parties, NGOs, and observers alike. Participants in the final discussions on this compromise solution have described these negotiations as yet another, almost epic '*épreuve de force*' between the conflicting approaches of State-oriented bilateralism and the prioritization of 'communalized' interests. While this article is not the right place to delve into the intricacies of the compromise solution found,[41] one may recall at

[37] M Cottier, 'Article 8' in Triffterer, *Commentary on the Rome Statute* (n 24) MN 9; H von Hebel and D Robinson, 'Crimes within the Jurisdiction of the Court' in RS Lee (ed), *The International Criminal Court—The Making of the Rome Statute* (Kluwer Law International, 1999) 124.

[38] *The Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424, Pre-Trial Chamber II (15 June 2009) para 225.

[39] For a report on the state of discussion on the definition of crime of aggression around 2000–02, see HP Kaul, 'The Crime of Aggression: Definitional Options for the Way Forward' in M Politi and G Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate, 2004) 97–104; see also HP Kaul, 'The Crime of Aggression. Towards its Effective Inclusion in the Subject-matter Jurisdiction of the International Criminal Court' in S Perrakis (ed), *International Criminal Court. A New Dimension in International Justice. Questions and Prospects for a New Humanitarian Order* (A Sakkoulas, 2002) 105–12.

[40] For a comprehensive overview of the work of the Special Working Group, see S Barriga, W Danspeckgruber, and C Wenaweser (eds), *The Princeton Process on the Crime of Aggression* (Lynne Rienner, 2009).

[41] The text of (future) Art 8bis ICC Statute reflecting the definition of the crime of aggression and the related provisions on the exercise of jurisdiction may be found in Annex I of Resolution RC/Res.6 of the Assembly of State Parties (ASP). The corresponding Elements of Crimes have been set out in Annex II, while Annex III of the said resolution provides the understandings regarding the

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least the following key features: for the very first time, (future) Article 8bis ICC Statute provides a definition of the crime of aggression establishing individual criminal responsibility for future perpetrators of this crime. The definition distinguishes between the 'crime of aggression' committed by a leader pursuant to paragraph 1 and an 'act of aggression' by a State against another State, as a precondition of such crime, pursuant to paragraph 2. The latter precondition draws to a large extent on the language of the UNGA Resolution 3314 (XXIV) of 14 December 1974, which ultimately ensured acceptance amongst delegations. The wording of Article 8bis ICC Statute reveals several built-in quantitative and qualitative qualifiers which serve to accommodate and assuage State concerns.[42] The complex details of the exercise of jurisdiction over the crime of aggression are provided for in (future) Articles 15bis and 15ter ICC Statute. The text of these provisions also reveals a carefully balanced procedural scheme which accords the Security Council an exceptional position and pays due regard to the concept of State consent. Overall, the fact that agreement was reached on the crime of aggression, despite all its jurisdictional limitations, demonstrates that, in the end, community interests prevailed. It is quite remarkable that despite all setbacks the window of opportunity was used to agree on the contours of a community interest which goes to the heart of sovereignty-sensitivities of governments. The significance of this development cannot be understated.

From the above, it seems permitted to conclude that in defining the jurisdiction *ratione materiae* of the Court, the Statute strikes a balance between the 'communalized' interests to prosecute the most serious crimes of concern to the international community as a whole, and sensitivities of States to withstand judicial activism in grey areas and jurisdictional overlap. To this end, certain hurdles have been incorporated in the Court's jurisdictional edifice. This intention also evidences that stringent substantive requirements in the definition of international crimes are designed to address only the most egregious and heinous crimes, forming the nucleus of the wider sphere of human rights violations.

amendments to the Rome Statute on the crime of aggression. The resolution is available at <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 25 August 2010.

[42] Article 8bis(1) ICC Statute reads: 'For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, *by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*' (emphasis added). In addition, the understandings clarify: '6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations. 7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.'

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IV. The Emergence of the 'ICC Community'

The adoption of the Statute brought about a further development which is often overlooked, or not yet fully noticed—the emergence of an 'ICC community' with distinct roles for its various actors. Who are those actors? At the centre lies the Court itself with a particular responsibility for the judges and the Prosecutor. The Court is surrounded by the States parties, the UN and other inter-governmental organizations, non-States parties, NGOs, victims, and individuals charged with crimes under the Statute. Considering the plurality of the community underlying the ICC system, Bruno Simma's conclusion in 1994 continues to be quite pertinent when he clarified that the international community not only comprises all States but in the last instance all human beings.[43] Some of these actors join the Court in pursuing the 'communalized' interests, others remain hesitant or diametrically opposed to this goal. Ultimately, the different conflicting perspectives are brought before the Court vested with the power to strike the appropriate balance.

The Court and its organs pursuant to Article 34 ICC Statute (Presidency, Judicial Divisions, Office of the Prosecutor and Registry) constitute the core entity of the 'ICC community'. As already explained above, the Court as a whole represents and pursues the community interest to prosecute 'the most serious crimes of concern to the international community as a whole' and hold perpetrators of such crimes accountable. Within the Court it is at first the Prosecutor and his office which pursue this interest when analysing potential situations and initiating investigations (Articles 15 and 53 ICC Statute). But the Prosecutor does not monopolize this interest within the Court's framework. Once proceedings commence, other actors may have a say in relation to the Prosecutor's investigations and prosecutions, most notably the Chambers (Articles 15(4), 53(3), 61 and 74 ICC Statute), the participating victims (Articles 15(3) and 68(3) ICC Statute), and amici curiae (rule 103 of the Rules of Procedure and Evidence). Therefore, it may be argued that within the framework of the Statute community interests are not left entirely in the hands of the Prosecutor in relation to investigations and prosecutions, including the selection of situations and cases.

The Court's natural allies are the States parties within the 'ICC community'. Under the principle of complementarity, States parties pursue community interests by way of investigating and prosecuting grave atrocities at the national level. At the international level, States parties pursue community interests by supporting and cooperating with the Court. Importantly, they have the primary role to encourage third States to accede to the Rome Statute. However, as set out in Section III above, they may, at times, find themselves in antithesis to the community's—and consequently the Court's—position if their national interests are affected. In this

[43] Simma, 'From Bilateralism to Community Interest' (n 1) 234.

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case, the Statute offers certain solutions as discussed above. States parties engage with the Court in a twofold manner: they may act individually or collectively on an institutional level through the Assembly of States Parties (ASP).[44] With respect to collective action, the ASP offers the appropriate forum to discharge their statutory obligations.[45] The ASP is not part of the Court's structure as evidenced by Article 34 ICC Statute but acts as the 'legislature' for many of the institution's basic documents thus evincing a form of separation of powers between the two entities.[46] As a corpus, the ASP blends into the conceptual architecture of international law. It is a forum in which the States parties organize themselves on the basis of the principle of sovereign equality. Any dispute between two or more States parties relating to the interpretation or application of the Statute may be addressed by the classic means of dispute settlement which includes negotiations and referral to the ICJ.[47] The ASP is also free to settle disputes by recommendation on further means of settlement. This sort of arrangement is actually reflective of the States' classical behaviour in resolving their inter-State differences.

The UN is a further important stakeholder in the 'ICC community'. Without the impetus and assistance of the UN, the creation of the Court would have been impossible. In turn, the Statute acknowledges the prominent role the UN holds within the architecture of international law. First, it reaffirms in its Preamble the Purposes and Principles of the UN Charter which reflect the normative constitutional background of the environment in which the young judicial institution has been embedded. Secondly, the Statute also takes due note of the UN organs

[44] Art 112 ICC Statute.

[45] The functions of the ASP are set out in different provisions throughout the Statute, primarily in its Art 112. The Assembly, inter alia, decides on the budget of the Court (Art 112(2)(d)), has the power to establish subsidiary organs, as necessary (Art 112(4)), and provides management oversight to the Court (Art 112(b)). The Assembly also addresses any question relating to non-cooperation with the Court (Art 112(2)(f)).

[46] Besides the ICC Statute, the ASP has adopted the Court's Rules of Procedure and Evidence (Art 51 ICC Statute) <http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf> accessed 25 August 2010; the Elements of Crimes (Art 9 ICC Statute) <http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf> accessed 25August2010;theCodeofProfessionalConduct(Art8oftheRulesofProcedureandEvidence)<http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf> accessed 25 August 2010; the Regulations of the Trust Fund for Victims (Art 79 ICC Statute) <hrtp://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf> accessed 25 August 2010; the Staff Regulations (Art 44 ICC Statute) <http://www.icc-cpi.int/NR/rdonlyres/3119BD70-DFB6-4B8C-BC17-3019CC1D0E21/140182/Staff_Regulations_120704EN.pdf> accessed 25 August 2010; and the Financial Regulations and Rules (Art 113 ICC Statute) <http://www.icc-cpi.int/NR/rdonlyres/D4B6E16A-BD66-46AF-BB43-8D4C3F069786/281202/FRRENG0705.pdf> accessed 25 August 2010. In addition, the ASP may provide comments to the Regulations of the Court (Art 52 ICC Statute).

[47] Art 119(2) ICC Statute. See also TN Slade and R Clark, 'Preamble and Final Clauses' in Lee, *The International Criminal Court* (n 37); R Clark, 'Article 119' in Triffterer, *Commentary on the Rome Statute* (n 24).

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and their institutional mandate. In the Statute mention is made of the General Assembly,[48] the Security Council,[49] the Secretary-General[50] as head of the UN Secretariat, and the ICJ.[51] The ties between the Court and the UN have been further strengthened by bringing the Court into relations with the UN on the basis of a formal relationship agreement (Article 2 ICC Statute).[52] But the relationship agreement and statutory references to some UN organs go beyond the establishment of a simple cooperative relationship on technical matters between two international organizations. Considering that the crimes subject to the jurisdiction of the Court may threaten international peace and security, the Security Council has been given a crucial position within the jurisdictional regime of the Court: it has been vested with far-reaching statutory powers to refer a situation to the Court (Article 13(b) ICC Statute)—for which no link to territoriality or nationality needs to exist—and request the deferral of an investigation or prosecution (Article 16 ICC Statute). Admittedly, the intervention of an 'outside' political body in the context of judicial proceedings may raise concerns. However, it is clear that the founding fathers deliberately opted for this mechanism to garner support for the ICC project. What remains to be said is that this particular interplay between the Court and an organ of the UN, vested with the primary responsibility to maintain international peace and security, demonstrates the general commitment of the UN to pursuing community interests as defined under the Statute.[53] This does not mean, of course, that differences of opinion may not arise as to how a particular scenario should be addressed. In any event, this would be an inevitable corollary of the different mandates and the institutional independence of both

[48] Art 115(b) ICC Statute, regulating the funds of the Court and of the ASP, acknowledges the fiscal powers of the UNGA if funds are provided to the Court by the UN. Further, Art 112(10) ICC Statute establishes that the official and working languages of the Assembly are to be those of the UNGA. The official and working languages of the UNGA are decided by resolutions of the UNGA; see also UNGA Rules of Procedure of the General Assembly, Rule 51 (2007) UN Doc A/520/Rev.17.

[49] Arts 13(b), 16 (and 8bis, 15bis), 53(2)(c), (3)(a), 87(5)(b) and (7) ICC Statute.

[50] Arts 121(1), (4), (7), 122(1) [amendment provisions]; Art 123 [convening a Review Conference]; Arts 125(2), (3), 126(1), 127(1), 128 [technical provisions regarding deposition, entry into force and withdrawal]. The existing conference and secretariat structures of the UN have been widely used since the early beginning of the Court's *travaux préparatoires*. As evidenced by the numerous references in the ICC Statute, the UN Secretariat continues to play a pivotal role in conference organization and treaty administration of the ICC Statute.

[51] As mentioned above, a dispute between two or more States parties relating to the interpretation or application of the Statute may be referred to the ICJ pursuant to Art 119(2) ICC Statute.

[52] The 'Negotiated Relationship Agreement between the International Criminal Court and the United Nations' (Negotiated Relationship Agreement) entered into force upon signature of the UN Secretary-General and the President of the ICC on 4 October 2004, see ICC-ASP/3/Res.1 <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-01-ENG.pdf> accessed 25 August 2010. The Negotiated Relationship Agreement contains in its Art 2 an articulation of the reciprocal respect of both entities regarding each other's status and mandate. It provides several provisions on institutional relations and cooperation and judicial assistance.

[53] See UNSC 'Statement by the President of the Security Council' (29 June 2010) UN Doc S/PRST/2010/11; UNSC 'The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616.

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entities. Despite the inextricable linkage with the UN, the ICC—just like the ICJ as the principal judicial organ of the UN or any other court of law—remains an independent institution.[54] Both organizations, the UN and the ICC, meet at the same level; no hierarchical relationship exists.

Other inter-governmental organizations may also join the cause of the Court by providing assistance and cooperation.[55] Situations may arise in which the organization concerned is not in direct conflict with the interests of the community but its interests need to be protected equally. Where, for example, the cooperation of an inter-governmental organization with the Court may adversely affect the former's position or staff, safeguards have been included in the Statute to accommodate such concerns, such as the possibility of confidentiality agreements (Article 54(3)(e) ICC Statute) or non-disclosure of information or documents (Article 73 ICC Statute). Thus, the contribution to community interests is secured while at the same time the particular interests of the cooperating organization are safeguarded. Where the protection demands of the inter-governmental organization encroach upon the rights of the defence and the principle of publicity of proceedings it is the task of the judges to strike a careful balance between the legitimate concerns advanced by third actors and the rights of the accused.

It may be surprising, but only at first glance, that non-States parties also partake in the 'ICC community', both de lege and de facto. The Statute has foreseen the interaction with non-States parties which voluntarily consent to join the Court in pursuing community interests by trying persons for the most serious crimes. To this end, non-States parties may accept the exercise of the jurisdiction of the Court by lodging a declaration under Article 12(3) ICC Statute. Or they may wish to cooperate with the ICC on the basis of an ad hoc agreement or arrangement (Article 87(5) ICC Statute). Interaction with the Court in these instances is the consequence of a legal undertaking by the third State. Apart from that, the Statute does not impose, as such, any legal obligation on a State which has not consented to the Treaty. The Statute is therefore in accord with the principle of *pacta tertiis nex nocent nec prosunt* and leaves it for the sovereign State either to

[54] Para 9 of the Preamble to the ICC Statute; Art 2 of the Negotiated Relationship Agreement.

[55] The ICC Statute foresees the interaction with intergovernmental/regional organizations in Arts 15(2), 44(4), 54(3)(c), (3)(d), 73, 87(1)(b) and (6). The Court has concluded an agreement with the European Union on cooperation and assistance (entry into force on 1 May 2006) <http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf> accessed 25 August 2010 and a Memorandum of Understanding with the Asian-African Legal Consultative Organization (entry into force 5 February 2008) <http://www.icc-cpi.int/NR/rdonlyres/10081636-FCFA-448D-9106-6EF62A746C43/0/ICCPres050108ENG.pdf> accessed 25 August 2010. The Court has also concluded an agreement with the International Committee of the Red Cross (ICRC) on visits to persons deprived of liberty pursuant to the jurisdiction of the ICC (entry into force 13 April 2006) <http://www.icc-cpi.int/NR/rdonlyres/A542057C-FB5F-4729-8DD4-8C0699DDE0A3/140159/ICCPRES020106_English.pdf> accessed 25 August 2010 (knowing that the ICRC is not an inter-governmental organization).

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join the Treaty or not. But non-States parties may nevertheless be affected by the Statute de facto. Three examples may illustrate this reality: the effects of a Security Council referral pursuant to Article 13(b) ICC Statute, the inclusion of the principle of territoriality as a jurisdictional basis in the Statute, and the list of crimes as set out in Articles 6, 7, and 8.

The drafters of the Statute designed one key element of the jurisdictional scheme of the ICC in such a manner that in the case of a Security Council referral pursuant to Article 13(b), non-States parties may be subjected to ICC jurisdiction without their consent.[56] But what seems to be a grave intrusion into State sovereignty by the Statute is actually the intervention of the powerful Security Council vested with the power to enforce peace under Chapter VII of the UN Charter, 'regardless of the will of the [target State]'.[57] Thus, community interests to prosecute the most serious crimes override any (bilateralist) interest of a concerned non-State party. The second mechanism by which a non-State party may be affected is provided by the recognition of the principle of territoriality in Article 12(2)(a) ICC Statute as a potential basis for ICC jurisdiction if a national of a non-State party allegedly committed a crime on the territory of a State party. Earlier criticism over this principle in the statutory framework has abated or disappeared: it seems accepted today that the 'communalized' interest to put an end to impunity is pursued on the basis of the principle of territoriality as it is considered legally unassailable under international law that each State has the right to prosecute crimes committed on its own territory regardless of the nationality of the perpetrator or—consequently—may opt, according to the principle of complementarity, to cede the case to the ICC.[58] In both cases depicted above, however, State sovereignty concerns have been factored into the Statute by way of Article 19(2)(b) which provides any State, including a non-State party, with the possibility to challenge the admissibility of a case, thus barring the Court from exercising its jurisdiction. Finally, the third way by which non-States parties are also affected by the Statute stems from the comprehensive codification of genocide, crimes against humanity, and war crimes in Articles 6, 7, and 8 of the ICC's founding treaty. It may be argued that these provisions reaffirm and concretize standards and obligations of contemporary international customary law which non-States parties have to respect and adhere to.[59] Thus, Articles 6,

[56] Referral of the situation in the Republic of Darfur/Sudan pursuant to UNSC Res 1593 (31 March 2005) UN Doc S/Res/1593.

[57] JA Frowein and N Krisch, 'Introduction to Chapter VII' in B Simma (ed), *The Charter of the United Nations, A Commentary* (2nd edn, Oxford University Press, 2002) MN 15.

[58] See two examples of academic debates: R Wedgwood, 'The International Criminal Court: An American View' (1999) 10 Eur J Intl L 93; G Hafner et al, 'A Response to the American View as Presented by Ruth Wedgwood' (1999) 10 Eur J Intl L 108; M Morris, 'High Crimes and Misconceptions: The ICC and non-Party States' (2001) 64 L & Contemporary Problems 13; MP Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) 64 L & Contemporary Problems 67.

[59] It is undisputed that Art 6 ICC Statute, depicting the language of Art II of the Genocide Convention, represents customary law: see *Reservations to the Convention on the Prevention and*

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7, and 8 ICC Statute, albeit not binding treaty law as such, nevertheless may serve as a point of reference for non-States parties as well. Given this situation, it is not surprising that since the Rome Conference the crimes as set out in Articles 6, 7, and 8 have been quite uncontroversial in international discourse or have even been recognized by some important non-States parties, including the US, as modern international criminal law.

Another important actor within the ICC community is the vast number of NGOs. The role and merits of those actors in the creation of the Court are beyond any doubt.[60] Through their participation in the ICC project, they assist in anchoring the Court in the midst of civil societies. It is obvious that the Court simply cannot be successful without the support, understanding, and acceptance of civil society and all peoples. Today, they are an important communication channel between the Court and the peoples of the world. NGOs, like the International Coalition for the ICC, Human Rights Watch, and Amnesty International, closely monitor the activities of the Court and those of States parties and provide, if necessary, constructive criticism. But apart from channelling information, the NGO community may have a place in proceedings before the Court to contribute to the pursuit of community interests. They may provide valuable information to the Prosecutor in the preliminary examination phase (Article 15(2) ICC Statute) and background material which the parties may present as evidence; they may serve as amicus curiae in proceedings (rule 103 of the Rules of Procedure and Evidence) or gratis personnel offering their expertise (Article 44(6) ICC Statute), assist in the process of victims' participation in ICC proceedings, and be involved in the activities of the Trust Fund for Victims (Article 79 ICC Statute). As with inter-governmental organizations, possible security concerns, forming an equal interest with that of the international community, have been taken up and accommodated by provisions related to non-disclosure of information and witness protection (Article 68(1) ICC Statute and rule 81(4) of the Rules of Procedure and Evidence).

Punishment of the Crimes of Genocide (Advisory Opinion) [1951] ICJ Rep 15, 23. It is equally argued that the 50 offences listed under Art 8 ICC Statute reflect well-established international law, see M Cottier, 'Article 8' in Triffterer, *Commentary on the Rome Statute* (n 24) MN 4; with further references to the negotiating process see von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court' (n 37) 103 et seq; ICRC, 'War Crimes under the Rome Statute of the International Criminal Court and their source in International Humanitarian Law' <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/war-crimes-factsheet-311008/$File/EN%20-%20War_Crimes_Comparative_Table.pdf> accessed 25 August 2010. There is also general agreement that the concept of crimes against humanity is well entrenched in customary law, albeit its contour was varying in pertinent precedents: see A Cassese, 'Crimes against Humanity' in Cassese, Gaeta and Jones, *The Rome Statute* (n 16) Vol I, 373–7.

[60] W Pace and J Schense, 'The Role of Non-Governmental Organizations' in Cassese, Gaeta and Jones, *The Rome Statute* (n 16) Vol I, 105; for a critical study on the issue of NGO participation in international law-making, including in the context of the elaboration of the Rome Statute, see A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, 2007) 57 et seq.

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Those who have suffered most from the crimes subject to the jurisdiction of the Court, the victims, have been accorded a particular position within the 'ICC community'. The ICC framework offers the unique opportunity for victims to participate actively in proceedings (Article 68(3) ICC Statute), thus contributing to the pursuit of community interests as defined under the Statute.[61] However, they are not auxiliaries of the Prosecutor and must therefore be regarded as independent stakeholders of the 'ICC community'. Their interests may coincide with those of the Prosecutor, but may also differ.[62] Obviously, the interests of victims clash with those of the accused. Consequently, a careful balance must be undertaken by the judges of the Court when determining their participation by rendering victims' participation effective, on the one hand, and defining it in such a manner that is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial, on the other hand. How this balance has been designed in the early years of the Court's existence is illustrated in Section V below.

Opposite the Prosecutor and the victims in court sits the accused together with his or her legal counsel. The accused also forms part of the 'ICC community' even though he or she stays diametrically opposed to the interests of the international community. The rights of the accused have been enshrined in many provisions of the Statute, most prominently in Article 67, which clarifies that these rights are 'minimum guarantees'. Other statutory provisions, such as Articles 19, 20, 22, 23, 24, 55, 57(3)(b), 60, 81, 82, and 84, further complement these rights. A further source of law is the corpus of internationally recognized human rights according to which the Statute, including the provisions stipulating the rights of the accused, must be interpreted and applied (Article 21(3) ICC Statute).[63] In general, the accused for obvious reasons has an interest in having a fair and expeditious trial (Article 64(2) ICC Statute) in which he or she is given the opportunity to present his or her arguments and present evidence against the charges brought by the Prosecutor. How and to what extent the rights of the accused have been safeguarded in the first ICC proceedings is illustrated in Section V below.

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[61] The Court may also award reparations to, or in respect of, victims against convicted defendants in accordance with Art 75 ICC Statute. These 'reparation claims' materialize after conviction of the accused and remain therefore generally outside the realm of the balancing exercise during the investigation or prosecution of crimes subject to the jurisdiction of the Court.

[62] *Situation in Democratic Republic of Congo* (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) ICC-01/04-101-tENG-Corr, Pre-Trial Chamber I (17 January 2006) para 51; *Prosecutor v Jean-Pierre Bemba Gombo* (Fourth Decision on Victims' Participation) ICC-01/05-01/08-320, Pre-Trial Chamber III (12 December 2008); see also the joint request of victims dated 22 May 2009 in the *Lubanga* trial to modify the legal characterization of the facts of the case pursuant to reg 55 of the Regulations of the Court, *Prosecutor v Thomas Lubanga Dyilo* (Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court) ICC-01/04-01/06-1891-tENG, Trial Chamber I (22 May 2009).

[63] *Prosecutor v Thomas Lubanga Dyilo* (Judgment of the Appeal of Mr Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Stature) ICC-01/04-01/06-772, Appeals Chamber (14 December 2006).

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V. Balancing Community and Individual Interests in ICC Proceedings

Three issues may assist to demonstrate how community interests have been identified and balanced in the early jurisprudence of the Court. The examples concern: (1) the authorization of Pre-Trial Chamber II to commence an investigation in the Republic of Kenya; (2) the rights of the accused; and (3) victims' participation in proceedings before the ICC.

1. At the crossroads: the authorization of Pre-Trial Chamber II to commence an investigation in the Republic of Kenya

The decision of Pre-Trial Chamber II of 31 March 2010[64] is the first occasion a Pre-Trial Chamber has adjudicated on Article 15(4) ICC Statute.[65] It displays the juridical debate between the judges of that Chamber on the following question: would the events as presented by the Prosecutor qualify as crimes against humanity and concern the international community as a whole, warranting the intervention of the ICC, or would they fall short of this requirement and remain under the exclusive jurisdiction of the national State? In his request dated 26 November 2009 the Prosecutor solicited the Chamber's authorization to commence an investigation *proprio motu* in relation to events which purportedly occurred during the post-election violence 2007–08. Until the filing of the Prosecutor's request, the Republic of Kenya had declined to refer the situation to the Court but assured its cooperation under the Statute. Upon examination of the request and available information, the Chamber, by majority, saw the interests of the community affected by the alleged events and authorized the commencement of the investigation in relation to crimes against humanity pursuant to Article 7 ICC Statute. The central question of this decision—which led to one judge dissenting—concerned the interpretation of Article 7(2)(a) ICC Statute which further defines the contextual notion of 'attack directed against any civilian population' as meaning the 'multiple commission of acts ... against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack'. While the majority in the Chamber saw the factual information meet this requirement, the dissenting judge opined that serious crimes had been committed, but not within the context of an attack against the civilian population *pursuant to or in furtherance*

[64] *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19, Pre-Trial Chamber II (31 March 2010).

[65] Art 15(4) ICC Statute reads: 'If the Pre-Trial Chamber, upon examination of the [Prosecutor's] request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.'

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of a State or organizational policy to commit such attack. As the information provided did not satisfy this legal requirement, he saw the 'decisive element [lacking] which triggers the jurisdiction of the Court, elevates the acts concerned, which otherwise would fall exclusively under the responsibility of national jurisdictions, to international crimes and sets aside State sovereignty'.[66] The dissenting judge further clarified his understanding of the statutory framework which, in his opinion, introduces a demarcation line between international crimes and human rights infractions; between international crimes warranting the intervention of the ICC and ordinary crimes punishable under domestic penal legislation.[67] This decision is the first within the ICC to date which contributes to the possible discussion of the *raison d'être* of crimes against humanity pursuant to Article 7 ICC Statute. It encapsulates the discussion about what concerns the international community as a whole and what should remain the responsibility of an individual State. It is hoped that more decisions with some clarification on this issue will follow.

2. Striking the right balance: the rights of the accused

Fair proceedings with due respect for the rights of the accused is a matter for the Court's credibility and securing the support of and acceptance by the international community. The core of the judges' daily task in criminal proceedings consists of striking a balance between conducting a fair trial with a view to try those charged with the 'most serious crimes of concern to the international community as a whole' and the rights of the accused. The ICC Appeals Chamber has couched this antagonism in the following terms:

> Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a court: 'to see to the protection of individual fundamental rights which is the particular territory of the courts...'. Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

The international community has an interest in holding the individual accountable for the crimes he or she committed within the framework of fair and expeditious proceedings in which the accused is given the opportunity to defend him or herself against the charges. To this end, he or she has the right to be informed

[66] *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19, Pre-Trial Chamber II (Dissenting Opinion of Judge Kaul) (31 March 2010).

[67] Ibid, 118, para 65.

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promptly and in detail of the nature, cause, and content of the charges.[68] The details of this fundamental right have aroused much controversy in the early proceedings of the Court. This issue highlights the circumstances under which community interests are procedurally pursued before the ICC and how the judges of the Court interpret and apply the law with a view to rendering the rights of the accused effective. Under the Rome Statute, the Prosecutor must present at the pre-trial stage a concise document containing the charges.[69] Upon decision of the Pre-Trial Chamber confirming the charges,[70] the person concerned is committed to a Trial Chamber which will decide upon his or her innocence or guilt. Article 74(2) ICC Statute articulates that the Trial Chamber's decision 'shall not exceed the facts and circumstances described in the charges'. However, from the Court's early jurisprudence it is unclear who, or which document, determines the factual scope of the charges. Put otherwise, who is the 'master of the factual basis of a case' and can facts, which have been gathered during ongoing investigations,[71] be added by the Prosecutor after the confirmation of charges? Trial Chamber I ordered the Prosecutor to resubmit a new document containing the charges for trial allowing him to define the case;[72] Trial Chamber II rejected this avenue and found itself to be bound by the factual determinations of the Pre-Trial Chamber in its decision on the confirmation of charges.[73] The answer to this question has major consequences for the preparation of the defence, and related questions such as disclosure, amount of redactions and other protective measures, the scope of the trial and, ultimately, the relationship between the Pre-Trial and

[68] Art 67(1)(a) ICC Statute. In a somewhat unorthodox manner the Appeals Chamber dealt with this requirement in a footnote in *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court') ICC-01/04-01/06-2205, Appeals Chamber (8 December 2009) n 163.

[69] Reg 52 of the Regulations of the Court details the content of this document, requesting the Prosecutor to include personal information of the accused, a statement of the facts, including the time and place of the alleged crimes, and a legal characterization of the facts to accord both with the crimes and the precise form of participation.

[70] Art 61(7) ICC Statute.

[71] See the guidance provided by the Appeals Chamber in *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence') ICC-01/04-01/06-568, Appeals Chamber (13 October 2006).

[72] *Prosecutor v Thomas Lubanga Dyilo* (Order for the prosecution to file an amended document containing the charges) ICC-01/04-01/06-1548, Trial Chamber I (9 December 2008).

[73] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Filing of a Summary of the Charges by the Prosecutor) ICC-01/04-01/07-1547-tENG, Trial Chamber II (21 October 2009). Trial Chamber III seems to follow a mixed approach of requesting a new document containing the charges but also suggesting that the Pre-Trial Chamber submit as an annex to the confirmation of charges decision a 'statement of the facts': see *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges) ICC-01/05-01/08-836, Trial Chamber III (22 July 2010) para 30.

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Trial Chamber. Another related issue concerns the Prosecutor's strategy of cumulative charging in international criminal proceedings which will surely surface in future cases before the ICC. Without entertaining the pros and cons of such an approach here, it remains to be noted that so far Pre-Trial Chamber II in the case of *The Prosecutor v Jean-Pierre Bemba Gombo* has taken a firm stance on cumulative charging by rejecting some of the Prosecutor's charges on the grounds that cumulative charging was detrimental to the rights of the accused.[74] Better to assist the defence in its preparation efforts, a further development in ICC proceedings has set in with Pre-Trial Chamber III's decision to request both parties to provide an 'In-depth-Analysis Chart' when disclosing evidence.[75] The basic idea is that out of the enormous mass of available information, each incriminating piece of evidence disclosed must be analysed previously by the parties and put in relation to the constituent elements of the crimes, including the mode of participation, so that the analysis reflects the relevance of each disclosed piece of evidence. This practice has been applied by Trial Chamber II[76] and Trial Chamber III.[77] It is hoped that it will become an integral part of ICC proceedings in the future.

On 13 June 2008 the balancing process led Trial Chamber I to conclude that community interests were outweighed by the need to sustain the precept of fair trial.

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[74] *Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424, Pre-Trial Chamber II (15 June 2009). A leave of the Prosecutor to appeal this issue was rejected: *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo') ICC-01/05-01/08-532, Pre-Trial Chamber II (18 September 2009).

[75] *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties) ICC-01/05-01/08-55, Pre-Trial Chamber III (31 July 2008). A leave to appeal against this order was rejected by the Chamber in *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure) ICC-01/05-01/08-75, Pre-Trial Chamber III (25 August 2008). After not having fully complied with the Chamber's decision, the Chamber issued two decisions to the Prosecutor and the defence asking to comply with the Chamber's previous order: see *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence) ICC-01/05-01/08-232, Pre-Trial Chamber III (10 November 2008); *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Disclosure of Evidence by the Defence) ICC-01/05-01/08-311, Pre-Trial Chamber III (5 December 2008).

[76] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol) ICC-01/04-01/07-956, Trial Chamber II (13 March 2009). A leave to appeal of the Prosecutor was rejected on 1 May 2009: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol' and the Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol') ICC-01/04-01/07-1088, Trial Chamber II (1 May 2009).

[77] *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the 'Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart') ICC-01/05-01/08-682, Trial Chamber III (29 January 2010).

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The first trial in *The Prosecutor v Thomas Lubanga Dyilo* was halted because, in the view of the Chamber, the Prosecutor had inappropriately misused Article 54(3)(e) ICC Statute which he relied on when entering into confidentiality agreements with third party information providers and consequently withheld a significant body of exculpatory evidence from the accused.[78] The stay of proceedings was lifted six months later as soon as the Prosecutor complied with his disclosure obligations under Article 67(2) ICC Statute.[79]

Proceedings before the Court are also characterized by the fact that the accused can enjoy certain rights only with the support of States. Naturally, situations may arise in this context where the two interests, that of the accused and the State concerned, do not coincide. For example, requesting interim release under Article 60(2) ICC Statute requires that a State is willing to accept the accused on its territory (with or without conditions) for the duration of the ICC proceedings. Unless the States cooperate fully with the Court, the right to interim release remains a dead letter.[80] A further factual difficulty to the preparation of the defence is its access to useful information. This becomes crucial, for example, if the accused is seeking information from a State in order to challenge the admissibility of his or her case (Article 19 ICC Statute). It is obvious that the accused has limited means to force a State to disclose information related to national proceedings (or the State's inaction). It has been argued that directing the accused to the Prosecutor, who could be in possession of such material and who is under an obligation to disclose all material related to admissibility, may not prove entirely satisfactory because the accused's interest may lie in receiving direct information from the original source, the State.[81] In any

[78] *Prosecutor v Thomas Lubanga Dyilo* (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) ICC-01/04-01/06-1401, Trial Chamber I (13 June 2008). This decision was confirmed by the Appeals Chamber, *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008') ICC-01/04-01/06-1486, Appeals Chamber (21 October 2008).

[79] *Prosecutor v Thomas Lubanga Dyilo* (Reasons for Oral Decision lifting the stay of proceedings) ICC-01/04-01/06-1644, Trial Chamber I (26 January 2009).

[80] See, on this topic, *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa) ICC-01/05-01/08-475, Pre-Trial Chamber II (14 August 2009); *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa') ICC-01/05-01/08-631-Red, Appeals Chamber (2 December 2009).

[81] See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chu* (Decision on the 'Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of the Congo (DRC)') ICC-01/04-01/07-444, Pre-Trial Chamber I (25 April 2008).

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event, any Chamber is called upon to ensure that all material is put on the table timeously and in complete transparency.

3. Justice for the vulnerable: victims' participation in ICC proceedings

As explained earlier, victims have been accorded under the Statute a prominent role in ICC proceedings. They assist the Court in its pursuit of community interests and serve, in this regard, as a control instance at the same time. To this end, their role has not been reduced to that of mere observers but they may participate in proceedings with a view to expressing 'their views and concerns'.[82] They may do so in all stages of the proceedings, where appropriate, if their personal interests are affected (Article 68(3) ICC Statute). Their personal interest may flow from 'the desire to have a declaration of truth by a competent body (right to truth)', 'their wish to have those who victimized them identified and prosecuted (right to justice)', and the right to reparation.[83] Currently, over 1,000 victims have communicated with the Court either to participate in ongoing proceedings or to provide their representations in ICC proceedings.[84] In proceedings, they may serve as a useful information provider for the Chamber which is otherwise, to a large extent, dependent on the submissions of the Prosecutor and the defence. The modalities of their participation under the Statute encompass, inter alia, attendance at (public and/or closed) hearings, access to the (public and/or confidential) record of the case, notification of (public and/or confidential) filings and decisions, making oral and written submissions, questioning of witnesses, and, under certain conditions, presenting evidence and challenging their admissibility in Court.[85] Due to the rudimentary fashion in which victims' participation rights have been framed in the Statute, significant weight is attributed to existing human rights law and jurisprudence in light of which victims' participatory rights under the Statute are interpreted.[86]

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[82] It has been established practice at the Court that victims are commonly referred to as 'participants' thereby contrasting their role to that of the 'parties'.

[83] See in *Situation in Darfur, The Sudan* (Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case) ICC-02/05-02/09-121, Pre-Trial Chamber I (25 September 2009) para 3; see also *Prosecutor v Jean-Pierre Bemba Gombo* (Fourth Decision on Victims' Participation) ICC-01/05-01/08-320, Pre-Trial Chamber III (16 December 2008).

[84] A breakdown of the numbers of participating victims in ongoing ICC proceedings reveals the following (as at 9 July 2010). *Lubanga* trial: 104 victims; *Katanga/Chui* trial: 363 victims; *Bemba* trial: 135 victims; *Kony et al* pre-trial proceedings: 40 victims; *al-Bashir* pre-trial proceedings: 12 victims; *Harun/al Kushayb* pre-trial proceedings: 6 victims; *Abu Garda* pre-trial proceedings: 87 victims; pre-trial proceedings leading to the authorization of commencement of investigation in the Republic of Kenya: 406 victims providing individual and collective victims' representations.

[85] *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) ICC-01/04-01/06-1432, Appeals Chamber (11 July 2008); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial') ICC-01/04-01/07-2288, Appeals Chamber (16 July 2010).

[86] References in the jurisprudence of the Court include, in particular, the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights, as well as

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In general, Trial Chambers have granted comprehensive participatory rights to victims while Pre-Trial Chambers have remained rather restrictive, referring to the limited purpose and scope of pre-trial proceedings.[87] For obvious reasons, victims' participation may collide with the interests of the accused. More importantly, it must be avoided that the accused faces, or appears to face, two Prosecutors. It is therefore up to the Chamber to determine the manner in which those rights are effectively exercised which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Against this background, and considering the potential high numbers of victims wishing to participate in the future, Chambers have started to introduce procedural and organizational arrangements to allay those concerns, such as common legal representation[88] and the possibility to lodge collective representations.[89] It is too early to assess the effective impact of victims' participation on the Court's first trials. However, what can be discerned is that this operational scheme has brought the Court closer to the victims and the victims closer to the Court. They are provided with a forum in which they may express their views and directly interact with the judges. Incidentally, it is also an opportunity for the local legal profession in the 'situation' countries to bring to the Court expertise and information which the Court may otherwise be lacking in The Hague.

VI. Challenges and Future Perspectives

The creation of the ICC marked a momentous development which has changed the landscape of international law noticeably—one scholar even went so far as to argue already in 1998 that the adoption of the Rome Statute may be regarded as

the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147; and the Convention of the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[87] *Prosecutor v Jean-Pierre Bemba Gombo* (Fourth Decision on Victims' Participation) ICC-01/05-01/08-320, Pre-Trial Chamber III (12 December 2008); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case) ICC-01/04-01/07-474, Pre-Trial Chamber I (13 May 2008); *Prosecutor v Bahar Idriss Abu Garda* (Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case) ICC-02/05-02/09-121, Pre-Trial Chamber I (25 September 2009).

[88] *Prosecutor v Jean-Pierre Bemba Gombo* (Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims) ICC-01/05-01/08-322, Pre-Trial Chamber III (16 December 2008); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chu* (Order on the organisation of common legal representation of victims) ICC-01/04-01/07-1328, Trial Chamber II (22 July 2009).

[89] *Situation in the Republic of Kenya* (Order to the Victims Participation and Reparation Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute) ICC-01/09-4, Pre-Trial Chamber II (10 December 2009).

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an amendment of the UN Charter.[90] For the first time, an international criminal court has been created by the entire community of States as a result of multilateral negotiations, doing away with the old criticism of 'victor's justice' applying the law retroactively or selectively. At the Rome Conference, where traditional bilateralist mentalities and multilateralist ambitions met, in the end the political will for multilateralism, protecting community values in a collective effort, prevailed. Despite this, the drafters of the Statute remained realistic and pragmatic and embedded the Court in the existing organic and substantive infrastructure of the international legal order. This concerns primarily the existing foundations of inter-State relations. The skeleton of international law thus remained intact making the acceptance of the new construct by States easier. But in the last eight years—a relatively short time span in international law—the Court has been faced with realities of its institutional and operational construction which are noteworthy to be recalled and highlighted briefly.

The complex system underlying the Court's operation apparently needs more time to be fully accepted and adhered to by the international community and all concerned to develop its potential. It is foreseeable that every further step forward will continue to require hard work and sustained efforts from many sides. The first actor faced with this task is the Court itself. The ICC must consolidate its ongoing development into an efficient and professional international organization and, at the same time, into a functioning and credible international court. There are many areas in which the Court must improve and make its work and working methodologies more efficient. To avoid delays and continuously extended proceedings—one of the most corrosive problems also for the ICC—more energetic and innovative countermeasures and controls are necessary. Above all, the efficiency of the Office of the Prosecutor, which may be considered the 'engine' of the institution, is essential for the Court as a whole. Its continuing task is to develop into an even more effective organ for investigating and prosecuting crimes and securing the necessary international cooperation in criminal matters.

The Court, however, as the centrepiece of the 'ICC community' cannot alter fundamental legal or factual limitations or weaknesses of the system established by the Statute. In order to have a sober and realistic picture of the future perspectives for the ICC, it is necessary to be fully aware of the impact which some of these limitations in particular will continue to have for the work of the Court in the future. First, over the past decade, it has gradually become common knowledge that the Court is totally dependent on full, effective, and timely cooperation from States parties. In the absence of any executive powers and any police force of its own, the Court cannot be successful without active and steadfast support from States parties, not only in words, but, more importantly, in concrete deeds. This concerns in

[90] C Tomuschat, 'Das Statut von Rom für den Internationalen Strafgerichtshof' (1998) 73 Die Friedenswarte 335.

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particular the unresolved question of executing arrest warrants and transferring suspects to The Hague. It is not conducive to the cause of international justice that the large majority of warrants of arrest issued by pre-trial chambers since 2005 have not yet been executed for a number of years.[91] Given this situation, it is somewhat encouraging that the crucial role of national authorities in the execution of warrants of arrest was consistently highlighted during the debates of the Kampala Review Conference in June 2010. It remains to be seen, however, whether States parties will in practice assist the Court more proactively in this critical sphere, either by the formation of task forces to arrest suspects for the Court or other concrete arrest actions.

A second grave factual limitation continues to be the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometres away from the Court, with difficult access, unstable, and unsafe. Carrying out investigations in the Republic of Kenya, with regard to Darfur, or in the Central African Republic, the Democratic Republic of the Congo, or the Republic of Uganda has the consequence of logistical and technical difficulties and unprecedented problems, which no other prosecutor or court is faced with. Another grim reality is the notorious scarcity of financial and other resources available for investigations and other work of the Court.

A third limiting characteristic of the work of the Court relates to its specific mandate to investigate and prosecute genocide, war crimes, crimes against humanity, and in the future probably also the crime of aggression, and to contribute to preventing impunity for such crimes. Experiences in the five African situations currently before the Court indicate that genocide, crimes against humanity, and war crimes are usually committed during armed conflict as a result of orders 'from the top' issued by all kinds of political or military leaders, who at the same time make every effort to disguise their responsibility for the crimes behind a smokescreen of allegedly legitimate actions or politics. As a consequence the work of the Court will usually hover on the border between law and politics. This means that the Court will almost inevitably be caught between the poles of brutal power politics, on the one side, and the law and human rights, on the other. It is thus not surprising that the work of the Court will often continue to be hampered by adverse political winds or indeed political reproach of every colour. Against such a background, it seems realistic to assume that 'realpolitik' and States' interests will continue in the future, depending on the situation, to be important obstacles to the effectiveness

[91] To this day, the Court has issued 15 warrants of arrest of which only five have been executed (as at 29 October 2010). The warrants of arrest against Bosco Ntaganda (situation Democratic Republic of Congo), Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen (situation Republic of Uganda), Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, and Omar Hassan Ahmad Al Bashir (situation Darfur/Sudan), against whom two warrants of arrest have been issued, have not yet been executed. The proceedings against Raska Lukwyia, who died on 12 August 2006, were terminated on 11 July 2007.

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of the ICC. In the apparently eternal struggle between the quest for power and the rule of law, further disappointments and setbacks seem possible. Steadfastness, stamina, and readiness to weather further difficulties and crises with the determination of all concerned within the 'ICC community' will, therefore, be indispensable. For the Court itself, it remains essential that it continues to show through the way it conducts all its activities that it is a purely judicial, objective, neutral, and non-political institution and that it withstands all attempts to instrumentalize it for whatever purpose. A further grave and continuing challenge will be to cope with the many hopes and high expectations related to the work of the Court. States continue to have the primary duty to investigate and prosecute international crimes. Compared with them, compared with the problems and violent crises in this world, the Court will always be small and weak, more symbol than might. If only for reasons of costs and capacity, the Court will never be able to do more than conduct a few exemplary trials and thus set and confirm legal standards relevant for the international community as a whole.

Notwithstanding these limitations and weaknesses, since the 1990s the development of international law and international criminal law has come a long way. As a consequence, those who strive for more international justice and the protection of human rights, including through the use of international criminal courts, have a considerably better chance of making progress and seeing their hopes realized than in the nineteenth and twentieth centuries. There are clear signs that the Rome Statute's definitions of legal standards and punishable acts are already effective and are becoming increasingly recognized. The Court, in less than a decade since its solemn inauguration on 11 March 2003, has found a recognized place in the world of today. Therefore, despite all ongoing difficulties and unresolved issues, it is worth staying the course.

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